Supreme Court, U.S.
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No. 87-67

In The

Supreme Court of the United States

October Term, 1987

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ELTON FLOYD JAMES, SUPERINTENDENT,

Petitioner,

v.

JO NELL WISECUP,

Respondent.

—o—

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

—o—

BRIEF IN OPPOSITION FOR THE RESPONDENT

—o—

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QUESTIONS PRESENTED

1. Whether the Circuit Court correctly concluded that the trial court's instructions during the guilt-innocence phase of Respondent's trial were unconstitutionally burden-shifting.

2. Whether the Circuit Court correctly concluded that the burden-shifting instruction was not harmless.

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STATEMENT IN OPPOSITION TO JURISDICTION

The Petition for Writ of Certiorari was not filed within sixty (60) days of the denial of Petitioner's Motion for

Rehearing to the Eleventh Circuit Court of Appeals on April 23, 1987. Petitioner has failed to timely file his Petition pursuant to Rule 20 of the Supreme Court Rules, and failed to move the Court for an extension of time within which to file. Respondent respectfully requests that the Petition be dismissed for failure to comply with the Supreme Court Rules.

———o———

STATEMENT OF THE CASE

Respondent does not dispute the procedural history of the case as provided by the Petitioner.

Respondent submits the following facts to further inform the Court of the background of this case.

This case involves the death of Danny Wisecup, who was shot and killed during the course of an argument and struggle with his wife, Respondent Jo Nell Wisecup, in their home on November 2, 1979.

Danny and Jo Nell Wisecup had been married for a little over two years and, although Danny and Jo Nell lived together, socialized together and loved each other, they had numerous arguments. (T. 281-85, 229-30).

Testimony of those close to the Wisecup's reflected the fact that Danny sometimes had a violent temper and that when the couple argued, Jo Nell would oftentimes go to her parents' house until things settled down. (T. 230, 231, 284-88).

Jo Nell Wisecup testified that her husband had beaten her in front of other people, had choked her, hit her in the face and kicked her while she was on the floor. (T. 284-88).

Danny Wisecup died on November 2, 1979. Most of the events that led up to his death are not in dispute and are accurately reflected in the three statements given by Ms. Wisecup to the police as well as in the testimony of witnesses with no interest in the outcome of the case.

Shortly before 5:00 p.m. on November 2, 1979, Jo Nell Wisecup was at work at the office of Dr. Max Novack, a dentist in Warner Robins, Georgia, where she had been employed for almost five years. Ms. Wisecup was the dental assistant and receptionist. Danny Wisecup came into the doctor's office in a mad rage. He asked Jo Nell if she had taken money out of the credit union. She said she had and that the money was for Christmas. Danny Wisecup was mad because he wanted to use the money to pay for drugs. (T. 303-04). This conversation was witnessed by Mary Beth Enfinger, who was called to testify by the State. She testified that Ms. Wisecup was in a normal mood until Danny came in, and that Danny was the one who was mad when he came in. She specifically testified that Danny was mad and that he said, "I owe that guy some money for those drugs, and now, I don't have the money to pay him." (T. 198).

Both Ms. Wisecup and witness Enfinger testified that the argument started by Danny Wisecup continued for several minutes. (T. 198, 304-05).

Ms. Wisecup testified that she told her husband that she was going to go home, pick up her two and a half year old son at the baby sitter's across the street, and that she was going to go off for awhile, as she frequently did when they argued. (T. 288, 305). Ms. Wisecup testified that Danny told her that she "wasn't going." (T. 305).

This statement was corroborated by Mitchell Manning, an employee at the Greyhound Bus Station across the street from Dr. Novack's office. Mr. Manning testified that he saw Danny Wisecup leaving Dr. Novack's office and that he made the remark, "You're not going no damn where." (T. 218).

Danny Wisecup got home first. Jo Nell Wisecup arrived home second and parked her car. Ms. Wisecup testified that she left her purse and keys in her car and started walking across the street towards the Humphries house, where her child was being kept. Danny Wisecup came out of the house, took Jo Nell's keys out of her car. and went back into the house. Jo Nell saw this happen, turned around and went back towards her house. (T. 307). This sequence of events was confirmed by Velma Carroll, a neighbor, who saw Ms. Wisecup start out towards the Humphries house and then turn back as if called by someone.

Ms. Wisecup testified that she went through the garage and into the house through the back door. Danny was on the phone talking to Jo Nell's mother. He slammed down the phone and headed for the living room. (T. 308). This was corroborated by the trial testimony of Ms. Wisecup's mother and father. (T. 232, 255).

Ms. Wisecup testified that she told Danny that she wanted her car keys and that they argued about the keys. (T. 308-09). She described him as "furious." She stated that she was intent on leaving and that she would even have walked to get away from the house. As she started to go towards the door, Danny ran by her and went up the stairs. He came running back down the stairs and yelled,

"You're not going any god damn place. . . . If you go out that door, I'll shoot you." He had the gun. (T. 310).

Ms. Wisecup testified as follows. "I knew he meant it. He had never pulled that thing on me before." (T. 310).

Ms. Wisecup testified that she told him to put the gun down and that she was going to go ahead and go out the door. He ran up and grabbed her arm. He started slapping her. (T. 311).

Ms. Wisecup described the events that followed:

> I know I could feel his hand. I know I could feel his hand on the gun. I know I could feel, it was like both of our hands were together, because I wanted him to put it down, move it away before he hurt me, but he was slapping me, and he, I don't know. . . . I remember him, we were just struggling over that gun, and it was like the resistance broke loose, and I leaned one way and he leaned the other, and there was a pop, and that's when he reached up and grabbed his chest and said, 'Jo' (crying), and I caught him in my arms and sat down, and I told him to lay down, and he went to sit back up, and he was moaning, and all of a sudden blood started coming from his nose, and I reached up and grabbed the telephone, and I couldn't dial the number. I called the operator and told her to get them, and I repeated over and over again, it must have been twelve times, what my address was, they couldn't understand me, and they told me an ambulance would be there, and I hanged the phone up, and he started moving all over that floor. And all that blood started coming from his mouth and his nose, and I reached up there and grabbed those towels out of the drawer (crying), and he was bleeding so much, he was bleeding in my arms, and there was nothing I could do. I didn't know anything else to do for him. I kept, I reached up there and got more towels, and I grabbed the telephone again, and I got them back on the telephone,

> and I said, 'God, tell me what to do, he's bleeding to death, I know they should have been here by now.' They, I said—they said, just keep applying pressure and they'll be there soon, and I checked him and I couldn't get any pulse, I couldn't get anything out of him; and that's when Detective Maye walked in. I was still talking to the ambulance service. They just told me to keep applying pressure, and I didn't ever see him move again. I didn't know whether he was dead or not (crying). (T. 312-313).

Detective Maye described Ms. Wisecup as "crying and rather hysterical" (T. 33) when he arrived. The terms crying, hysterical, upset and trembling were used to describe Ms. Wisecup by all of the witnesses who saw her. (T. 33, 82, 122).

Detective Maye took a statement from Ms. Wisecup moments after he arrived at the house. Her statement was entirely consistent with her trial testimony except that she did not mention drugs in the first statement. (T. 9, *et seq.*). She also made a statement to police approximately five days later which was the same, and Danny's need for drug money was mentioned at that time.

Ms. Wisecup was charged with murder. At her trial, the Judge gave a jury instruction nearly identical to that found improper in *Francis v. Franklin,* 471 U.S. 307, 105 S.Ct. 1965 (1985), shifting the burden to Ms. Wisecup on the question of intent. (T. 351).

The Court below found that this instruction improperly shifted the burden on the issue of intent to Ms. Wisecup and that such error was not harmless under the facts of this case.

———o———

REASONS FOR NOT GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY CONCLUDED THAT THE TRIAL COURT'S JURY INSTRUCTIONS DURING THE GUILT-INNOCENCE PHASE OF RESPONDENT'S TRIAL WERE UNCONSTITUTIONALLY BURDEN-SHIFTING.

The circuit and district courts found that the following jury instruction was "virtually identical" to the jury instruction found unconstitutionally burden shifting in *Francis v. Franklin,* 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed. 2d 344 (1985):

> Every person is presumed to be of sound mind and discretion. The acts of a person of sound mind and discretion are presumed to be the product of that person's will. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts. These presumptions may be rebutted by any evidence to the contrary. (T. 351).

Comparing this charge to the one given in *Francis v. Franklin, supra,* 105 S.Ct. at 1969, shows that they are identical except for the word "any" in the last sentence.

The use of the word "any" in no way changes the burden shifting nature of the instruction and cannot be viewed as cleansing the unconstitutional nature of the instruction.

This Court's opinion in *Francis v. Franklin, supra,* is absolutely clear that it is the presumption that makes the instruction unconstitutional and that the quality of the evidence necessary to rebut the presumption plays no role in this evaluation.

The State made a similar argument to the Court in *Francis v. Franklin,* to the effect that the rebuttable na-

ture of the presumption rendered it constitutional. This was rejected:

> A mandatory rebuttable presumption is perhaps less onerous from the defendant's perspective, but it is no less unconstitutional.
>
> 105 S.Ct. at 1973.

The State also argues that other instructions contained in the charge would have prohibited a reasonable juror from viewing these presumptions as mandatory. Again, the Respondent refers to *Francis v. Franklin, supra,* and suggests that the circuit court was correct in rejecting this proposition.

This Court specifically held in *Francis v. Franklin, supra,* that other instructions that merely contradict the constitutionally infirm instruction "will not suffice to absolve the infirmity." 105 S.Ct. at 1975. The unconstitutional instruction would have to be *explained* in a way that absolves the unconstitutionality:

> The Court today holds that contradictory instructions as to intent—one of which imparts to the jury an unconstitutional understanding of the allocation of burden of persuasion—create a reasonable likelihood that a juror understood the instruction in an unconstitutional manner unless other language in the charge *explains* the infirm language sufficiently to eliminate this possibility.
>
> 105 S.Ct. at n. 8, p. 1976.

The portions of the charge cited by the State, regarding presumption of innocence, reasonable doubt, accident, and so forth, sometimes reflect contradictory instructions, but none of these instructions explains the mandatory presumption given by the Judge. In fact, many of these in-

structions, such as "no person will be presumed to act with criminal intentions . . ." (T. 350 and Appellant's Brief, p. 12) are also virtually identical to language in *Francis v. Franklin, supra,* at 1970 ("A person will not be presumed to act with criminal intention but the trier of fact . . .").

As was noted in *Francis v. Franklin, supra,* at 1974, the jury could have interpreted the two sets of instructions as indicating that the presumption was a means by which proof beyond a reasonable doubt as to intent could be satisfied. The same is true here, and this is a case where intent was *the* issue to be resolved by the jury.

Based upon the foregoing, Respondent respectfully suggests that the lower courts were correct in finding that the jury instruction given in this case was constitutionally infirm.

II. THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY FOUND THAT THE BURDEN-SHIFTING INSTRUCTION WAS NOT HARMLESS.

The Petitioner's assertion that the Respondent's defense was "physically impossible," "wholly implausible," and "frivolous" is, itself, a misrepresentation of the evidence and record in this case. In the first instance, the circuit court and district court considered whether the jury instruction error was harmless and concluded that, "although there is certainly sufficient evidence of intent to sustain a conviction of guilt, the evidence is not overwhelming . . ." (RI-12-5).

This is not a case where the defense was both "frivolous and a physical impossibility" as claimed by the State. In fact, the State has pushed this theory through the dis-

trict and circuit courts, and both courts have rejected the argument.

The State claims that ". . . ballistics experts testified that if there had been such a struggle the path of the bullet through the body of the victim would have been 'at an angle' rather than the straight path through the victim's body that was present in this case." (Petition, p. 15). In fact, Larry Howard of the Georgia State Crime Lab testified that Danny Wisecup was shot in the chest at a "downward angle." (T. 181). Danny Wisecup was six feet, one inch (6′1″) tall, and Jo Nell Wisecup is five feet, seven inches (5′7″). (T. 297). The entry wound in the chest, going slightly downward, and the level trail of the bullet at four point three feet (4.3′) from the floor is highly consistent with the struggling, falling couple.

The State asserts that there is significance in the fact that there was no powder residue on the hands of Danny Wisecup. (Petition, p. 15). However, Richard Ernest of the State Crime Lab testified that powder nitrate dissipates on its own in nine to 12 hours. It is uncontradicted that Danny Wisecup died at approximately 5:00 p.m. on November 2, 1979, and that his hands were not swabbed until 3:30 the following day. (T. 105).

The State claims that, "The ballistics expert testified that the pistol was fired from a distance of no less than two to five feet from the victim's entry wound." (Petition, p. 15). The fact is that Larry Howard of the State Crime Lab testified that he could not swear with any degree of certainty that the gun was any more than six inches (6″) away from Mr. Wisecup. (T. 188).

Thus, the State's own evidence and witnesses not only fail to contradict Ms. Wisecup's version of the facts, they are consistent with and tend to support her position.

The circuit and district courts properly concluded that intent was not conclusively shown, and it is clear that the lower courts properly applied the harmless error rule.

———o———

CONCLUSION

For all of the above and foregoing reasons, Respondent prays that the Petition for Writ of Certiorari filed on behalf of Elton Floyd James be denied.

DATED: This 12th day of August, 1987.

Respectfully submitted,

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